

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALEXANDER MYRICK,

Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE CO.,

Defendant.

Case No. C07-1778MJP

ORDER GRANTING
PLAINTIFF'S MOTION TO
REMAND

This matter comes before the Court on Plaintiff's motion to remand. (Dkt. No. 10.) Defendant opposes the motion. (Dkt. No. 14.) Having considered the motion and response, Plaintiff's reply (Dkt. No. 16), the notice of removal (Dkt. No. 1), the complaint (Dkt. No. 2), the declaration of Autum L. Davis (Dkt. No. 3), and the balance of the record, the Court GRANTS Plaintiff's motion to remand but DENIES Plaintiff's request for attorneys' fees and costs.

Background

Plaintiff filed this putative class action against Defendant Nationwide Mutual Insurance Company ("Nationwide") on September 26, 2007. Plaintiff asserts that Nationwide has made Personal Injury Protection ("PIP") coverage payments to insureds like Plaintiff and then inappropriately sought reimbursement for those payments from the insureds even though the insured had not been made whole by a third party tortfeasor. He alleges claims against Nationwide under the Washington Consumer Protection Act ("WCPA"), and for bad faith, negligence, breach of contract, and unjust enrichment. (Dkt. No. 2, Complaint.) Plaintiff has defined the class he seeks to represent as:

All persons in the State of Washington who, within the applicable limitations period, were covered by a motor vehicle liability insurance policy issued by Nationwide that

1 included PIP coverage, where Nationwide made payments under that PIP coverage
2 and later sought or recovered from its insured all or any portion of its PIP payments,
3 even though its insureds had not been made whole by their recovery from (or on
4 behalf of) an alleged third party tortfeasor.

5 (Compl. ¶ 16.) Plaintiff requests declaratory and injunctive relief, damages “in an amount as is
6 proven at trial,” trebling of damages under the WCPA, prejudgment interest, and attorneys’ fees
7 and costs. (Compl. at 8-9.)

8 On November 1, 2007, Nationwide filed a notice of removal. (Dkt. No. 1.) In its notice,
9 Nationwide asserts that this Court has diversity jurisdiction under the Class Action Fairness Act
10 (“CAFA”), 28 U.S.C. § 1332(d), because Plaintiff brought the action on behalf of a putative class
11 of at least 100 individuals, the minimum diversity requirement is met (i.e., at least one member of
12 the class is a citizen of a state different from any defendant), and the amount in controversy
13 exceeds \$5,000,000. Evidence of the amount in controversy is found in the declaration of Autumn
14 Davis, in which Ms. Davis states:

15 [F]rom January 2002 through the present Nationwide issued insurance policies to
16 Washington insureds containing Personal Injury Protection (“PIP”) coverage.
17 During this period Nationwide made PIP payments to Washington insureds and
18 later recovered in excess of \$7,000,000 of these PIP payments.

19 (Davis Decl. ¶ 3.)

20 On November 8, 2007, Plaintiff filed a motion to remand arguing that Nationwide has
21 failed to show that the amount in controversy exceeds \$5,000,000. Plaintiff also requests fees and
22 costs.

23 Discussion

24 I. Removal Jurisdiction Under CAFA

25 A civil action in state court may be removed to federal court if the federal district court
26 has original jurisdiction over the matter. 28 U.S.C. § 1441(a). As amended by CAFA, 28 U.S.C.
27 § 1332(d) grants district courts original jurisdiction over class actions where the aggregate
number of proposed plaintiffs exceeds 100, a minimum diversity requirement is met, and the

1 matter in controversy exceeds \$5,000,000, exclusive of interest and costs. See Loudermilk v. U.S.
2 Bank. Nat'l Assoc., 479 F.3d 994, 997 (9th Cir. 2007). In determining whether the jurisdictional
3 threshold has been met, the claims of the individual class members may be aggregated. 28 U.S.C.
4 § 1332(d)(6). The removing defendant has the burden of establishing federal jurisdiction,
5 including the required amount in controversy. Abrego Abrego v. The Dow Chemical Co., 443
6 F.3d 676, 683, 685 (9th Cir. 2006). “Where the complaint does not specify the amount of
7 damages sought, the removing defendant must prove by a preponderance of the evidence that the
8 amount in controversy requirement has been met.” Id. at 693.

9 The parties’ narrow dispute focuses on whether Defendant has met its burden of proving
10 by a preponderance of the evidence that the \$5,000,000 amount in controversy requirement has
11 been met. The only evidence Defendant points to is the Davis Declaration, in which Ms. Davis, a
12 “Senior Trainer/Development Instructor” at Nationwide, states that from January 2002 through
13 the present, “Nationwide made PIP payments to Washington insureds and later recovered in
14 excess of \$7,000,000 of these PIP payments.”¹ (Davis Decl. ¶ 3.) But as Plaintiff points out, this
15 evidence does not address the claims as pled in Plaintiff’s complaint. Plaintiff only seeks recovery
16 for those PIP payments Nationwide sought to recover where its insureds had not been made
17 whole by third party tortfeasors. Defendant does not argue or present any evidence suggesting
18 that the subset of recovered PIP payments focused on in Plaintiff’s complaint is equal to the total
19 number of PIP payments Nationwide actually recovered. If some of the \$7,000,000 in PIP
20 payments recovered by Nationwide were from insureds that had previously been made whole by
21 third party tortfeasors, those recoveries would not be included within the recoveries at issue in
22 this case. Moreover, if Nationwide recovered some of the PIP payments from someone other
23

24 ¹ Plaintiff argues that the Davis Declaration does not constitute competent evidence in
25 Washington because it is signed under penalty of perjury under the laws of the state of Iowa, not
26 Washington. But the Davis Declaration complies with 28 U.S.C. § 1746(2), which only requires that
27 a declarant execute the declaration in the United States and include with the declaration a statement
certifying “under penalty of perjury that the foregoing is true and correct.” 28 U.S.C. § 1746(2).

1 than the insured, those recoveries would fall outside the context of this lawsuit.

2 In effect, Nationwide has offered an overinclusive figure as its only evidence of federal
3 CAFA jurisdiction. That evidence does not suffice. The Court will not speculate as to what
4 percentage of the \$7,000,000 in payment recoveries actually fall within the purview of Plaintiff's
5 claims. Cf. Loudermilk, 479 F.3d at 1002 (holding that Defendant had not shown with "legal
6 certainty" that the amount in controversy meets CAFA's jurisdictional requirements where
7 Defendant "left [the court] to speculate as to the size of the class, the amount of unpaid wages
8 owed due to the rounding policy, and whether or not such members of the class qualify for
9 penalty wages").² Because Nationwide has failed to offer any evidence suggesting that the claims
10 as pled implicate more than \$5,000,000, Nationwide has failed to meet its burden of proving by a
11 preponderance of the evidence that removal jurisdiction is proper.

12 Nationwide complains that Plaintiff refuses to "stand by the representations made in his
13 Motion to Remand" and suggests that the Court should find jurisdiction based on the fact that
14 Plaintiff refuses to stipulate to limit his case. (Def's Resp. at 9-10.) Plaintiff refuses to stipulate to
15 exclude the scenarios that he identified in his motion to remand as being outside the purview of
16 his claims. Federal court jurisdiction does not rely on the stipulations, or lack thereof, of the
17 parties. Whether Plaintiff agrees to "limit" his case in any way is irrelevant to the jurisdictional
18 question presented.

19 **II. Attorneys' Fees**

20 Plaintiff requests an award of his costs and fees incurred for the motion for remand. When
21 a federal court remands a case, it "may require payment of just costs and any actual expenses,
22 including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "Absent
23 unusual circumstances, courts may award attorney's fees under § 1447(c) only where the
24

25 ² The Court acknowledges that Loudermilk employed a stricter "legal certainty"
26 standard than is in effect here. But even under the more lenient preponderance of the evidence
27 standard, Nationwide's evidence and reasoning falls short.

1 removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an
2 objectively reasonable basis exists, fees should be denied.” Martin v. Franklin Capital Corp., 546
3 U.S. 132, 140 (2005). The Franklin Court also instructed that fees serve to deter defendants from
4 prolonging litigation through removal:

5 The appropriate test for awarding fees under § 1447(c) should recognize the desire
6 to deter removals sought for the purpose of prolonging litigation and imposing costs
7 on the opposing party, while not undermining Congress’ basic decision to afford
8 defendants a right to remove as a general matter, when the statutory criteria are
9 satisfied.

10 Id. Although Defendant has failed to prove that CAFA jurisdiction exists, a reasonable basis for
11 removal may exist. Moreover, Plaintiff has not presented evidence suggesting that Defendants
12 sought removal to prolong litigation or impose costs on Plaintiff. The request for fees is denied.

13 **Conclusion**

14 Because Defendant failed to prove the requisite \$5,000,000 amount in controversy
15 requirement under CAFA, remand is appropriate. Plaintiff’s motion to remand is GRANTED but
16 the request for fees and costs is DENIED.

17 Dated: January 2nd, 2008.



18 Marsha J. Pechman
19 United States District Judge
20
21
22
23
24
25
26
27